

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**FEDERICO BALTAZAR**

Claimant

VS.

**IBP, INC.**

Respondent

Self-Insured

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Docket No. 211,837

**ORDER**

Claimant appeals from an Award entered by Special Administrative Law Judge William F. Morrissey on October 16, 1998. The Appeals Board heard oral argument May 18, 1999. Board Member Gary M. Korte has recused himself from participating in this case, and Jeff K. Cooper will act in his place.

**APPEARANCES**

Diane F. Barger of Wichita, Kansas, appeared on behalf of claimant. Brad Thornton of Dakota City, Nebraska, appeared on behalf of respondent, a qualified self-insured.

**RECORD AND STIPULATIONS**

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

The Special Administrative Law Judge limited the award to medical benefits only based on K.S.A. 44-501(c) after finding claimant was not disabled for one week from earning full wages. Claimant contends he is entitled to permanent disability because the injury required that he switch to a lighter job at a lower wage for a period of more than one week.

Respondent acknowledges there was a compensable injury with a February 28, 1996, date of accident for which there was timely notice but agrees with the finding that claimant is not entitled to permanent disability benefits because claimant was not disabled from earning a full wage for one week. Respondent contends the appropriate average weekly wage is \$457.86. Respondent denies that claimant suffered a compensable injury

with any date of accident other than February 28, 1996, and denies notice of accident for any other date. If permanent disability benefits are awarded, respondent contends the benefits should be for a scheduled injury only both because the evidence would not support a whole body disability and because, respondent argues, claimant should be bound by the statement of claimant's counsel at the start of the regular hearing. At that time, claimant's counsel advised the claim was for a scheduled injury only, not a whole body disability.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the arguments, the Appeals Board finds and concludes the Award should be reversed. Claimant is awarded benefits based on a 9 percent permanent partial disability to the right upper extremity.

### **Findings of Fact**

1. In approximately September 1995, claimant began having right arm and shoulder pain while operating an air knife in the course of his duties for respondent. Claimant reported the problem to his supervisor and went to the company nurse. The nurse initially gave claimant medication and Icy Hot and eventually sent claimant to Dr. Myron J. Zeller. As of February 28, 1996, Dr. Zeller recommended a job change, and claimant was assigned to a job called "wrapping paper," a job which entailed wrapping paper on the hooves of the cow. Dr. Zeller ultimately referred claimant to Dr. Gary M. Kramer.

2. Dr. Kramer first saw claimant March 25, 1996. Dr. Kramer diagnosed impingement syndrome, right shoulder. Claimant treated with Dr. Kramer for the next approximately one year. On March 14, 1997, Dr. Kramer released claimant to full duty. Dr. Kramer testified claimant had no complaints at that time, and he found no permanent impairment.

3. Ms. Rhonda Shipley, nurse manager for respondent, testified regarding respondent's dispensary records. Although claimant had right upper extremity problems in 1990 and 1991, the records show no visit in 1995 relating to right upper extremity problems. But on February 28, 1996, claimant presented with complaints to his bilateral upper extremities, neck, and back, with a date of accident of September 1, 1995. The records show claimant was referred to Dr. Kramer. Ms. Shipley testified claimant was put on light duty as of February 28, 1996.

4. Dr. P. Brent Koprivica examined and evaluated claimant's injury at the request of claimant's counsel. Dr. Koprivica first saw claimant December 27, 1996. At that time, Dr. Koprivica concluded claimant had not reached maximum medical improvement and so did not attempt to rate the impairment. Dr. Koprivica recommended surgery but none was offered claimant. Dr. Koprivica saw claimant again December 29, 1997. He rated the impairment as 14 percent of the whole person consisting of 15 percent impairment to the right upper extremity at the shoulder, which he converted to 9 percent of the whole person, for impingement syndrome and bicipital tendonitis, plus 6 percent of the whole person for

cervical/thoracic pain. Dr. Koprivica acknowledges that claimant did not have neck complaints when he first saw claimant, but he testified that the neck problems developed because of compensating for the shoulder problem. Dr. Koprivica also found minimal loss of range of motion of the neck and assigned no impairment due to loss of range of motion. He assigned an impairment rating to the neck because of complaints of pain which he understood were medically documented for more than six months.

Dr. Koprivica justified his rating for the upper extremity in part by reference to a provision in the AMA Guides which allows the rating to be higher when findings do not correspond to what is reflected by imaging techniques. When asked about the imaging techniques, Dr. Koprivica referred to x-rays which reflect degenerative osteophytes consistent with his diagnosis.

5. Dr. C. Reiff Brown performed an independent medical examination at the request of the Administrative Law Judge. Dr. Brown, who saw claimant August 5, 1997, rated the impairment as 9 percent of the right upper extremity for loss of range of motion and weakness in the shoulder and related musculature.

6. At the outset of the regular hearing in this case, claimant's counsel stated claimant was not claiming whole body disability, only a scheduled injury.

7. At the oral argument before the Appeals Board, claimant's counsel advised claimant agreed to the average weekly wage of \$457.86 respondent has claimed.

### **Conclusions of Law**

1. The Board finds claimant's date of accident to be February 28, 1996. Claimant did not leave work but on that date restrictions were implemented in the form of a change to a lighter-duty job. *Alberty v. Excel Corp.*, 24 Kan. App. 2d 678, 951 P.2d 967, *rev. denied* 264 Kan. \_\_\_\_ (1998).

2. K.S.A. 44-501(c) states that an employer is not liable for permanent disability benefits for an injury which does not disable the employee for a period of one week from earning full wages *at the work at which the employee is employed*.

3. Claimant was disabled for a week from the work at which he was employed. Even if claimant continued to earn the same wage after February 28, 1996, he did not earn the wage *at the work at which he was employed*. The purpose of the qualification in K.S.A. 44-501(c) is to remove certain minor injuries from eligibility for a permanent disability award. In this case, claimant was limited to a lighter-duty work for more than the requisite one week. Where the injury requires a lighter-duty work for one week or more, the claimant should be eligible for permanent disability benefits if the evidence otherwise establishes that the injury caused permanent disability.

4. The Board finds claimant is entitled to benefits based on 9 percent disability to the right upper extremity. This finding is based on the opinion of Dr. Brown. The Board finds Dr. Brown's opinion, as the court-appointed independent examiner, more persuasive than the opinions of either Dr. Koprivica or Dr. Kramer.

5. Based on the agreement at the hearing before the Board, the Board finds claimant's average weekly wage at the time of the accident was \$457.86

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Special Administrative Law Judge William F. Morrissey on October 16, 1998, should be, and the same is hereby, reversed.

**WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Federico Baltazar, and against the respondent, IBP, Inc., a qualified self insured, for an accidental injury which occurred February 28, 1996, and based upon an average weekly wage of \$457.86, for 20.25 weeks at the rate of \$305.26 per week or \$6,181.52, for a 9% permanent partial disability to the right upper extremity, all of which is currently due and owing less any amounts previously paid.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June 1999.

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BOARD MEMBER PRO TEM

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BOARD MEMBER

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BOARD MEMBER

c: Diane F. Barger, Wichita, KS  
Brad Thornton, Dakota City, NE  
Pamela J. Fuller, Administrative Law Judge  
Philip S. Harness, Director